it is said, there was no personal jurisdiction over Overmyer in the Ohio proceeding. The petitioner invokes *Pennoyer* v. *Neff*, 95 U. S. 714, 732 (1878), and other cases decided here and by the Ohio courts enunciating accepted and long-established principles for *in personam* jurisdiction. *McDonald* v. *Mabee*, 243 U. S. 90, 91 (1917); *Vanderbilt* v. *Vanderbilt*, 354 U. S. 416, 418 (1957); *Sears* v. *Weimer*, 143 Ohio St. 312, 55 N. E. 2d 413 (1944); *Railroad Co.* v. *Goodman*, 57 Ohio St. 641, 50 N. E. 1132 (1897); *Cleveland Leader Printing Co.* v. *Green*, 52 Ohio St. 487, 491, 40 N. E. 201, 203 (1895).

It is further said that whether a defendant's appearance is voluntary is to be determined at the time of the court proceeding, not at a much earlier date when an agreement was signed; that an unauthorized appearance by an attorney on a defendant's behalf cannot confer jurisdiction; and that the lawyer who appeared in Ohio was not Overmyer's attorney in any sense of the word, but was only an agent of Frick.

The argument then proceeds to constitutional grounds. It is said that due process requires reasonable notice and an opportunity to be heard, citing *Boddie* v. *Connecticut*, 401 U. S. 371, 378 (1971). It is acknowledged, however, that the question here is in a context of "contract waiver, before suit has been filed, before any dispute has arisen" and "whereby a party gives up in advance his constitutional right to defend any suit by the other, to notice and an opportunity to be heard, no matter what defenses he may have, and to be represented by counsel of his own choice." [9] In other words, Overmyer's position here specifically is that it is "unconstitutional to waive in advance the right to present a defense in an action on the note." [10] It is conceded that in Ohio a court has the

[9] Petitioners' Brief 16.

[10] Tr. of Oral Arg. 17.

power to open the judgment upon a proper showing. *Bellows* v. *Bowlus*, 83 Ohio App. 90, 93, 82 N. E. 2d 429, 432 (1948). But it is claimed that such a move is discretionary and ordinarily will not be disturbed on appeal, and that it may not prevent execution before the debtor has notice, *Griffin* v. *Griffin*, 327 U. S. 220, 231–232 (1946). *Goldberg* v. *Kelly*, 397 U. S. 254 (1970), and *Sniadach* v. *Family Finance Corp.*, 395 U. S. 337 (1969), are cited.

The due process rights to notice and hearing prior to a civil judgment are subject to waiver. In *National Equipment Rental, Ltd.* v. *Szukhent*, 375 U. S. 311 (1964), the Court observed:

> "[I]t is settled . . . that parties to a contract may agree in advance to submit to the jurisdiction of a given court, to permit notice to be served by the opposing party, or even to waive notice altogether." 375 U. S., at 315–316.

And in *Boddie* v. *Connecticut*, *supra*, the Court acknowledged that "the hearing required by due process is subject to waiver." 401 U. S., at 378–379.

This, of course, parallels the recognition of waiver in the criminal context where personal liberty, rather than a property right, is involved. *Illinois* v. *Allen*, 397 U. S. 337, 342–343 (1970) (right to be present at trial); *Miranda* v. *Arizona*, 384 U. S. 436, 444 (1966) (rights to counsel and against compulsory self-incrimination); *Fay* v. *Noia*, 372 U. S. 391, 439 (1963) (habeas corpus); *Rogers* v. *United States*, 340 U. S. 367, 371 (1951) (right against compulsory self-incrimination).

Even if, for present purposes, we assume that the standard for waiver in a corporate-property-right case of this kind is the same standard applicable to waiver in a criminal proceeding, that is, that it be voluntary, knowing, and intelligently made, *Brady* v. *United States*, 397

U. S. 742, 748 (1970); *Miranda* v. *Arizona*, 384 U. S., at 444, or "an intentional relinquishment or abandonment of a known right or privilege," *Johnson* v. *Zerbst*, 304 U. S. 458, 464 (1938); *Fay* v. *Noia*, 372 U. S., at 439, and even if, as the Court has said in the civil area, "[w]e do not presume acquiescence in the loss of fundamental rights," *Ohio Bell Tel. Co.* v. *Public Utilities Comm'n*, 301 U. S. 292, 307 (1937), that standard was fully satisfied here.

Overmyer is a corporation. Its corporate structure is complicated. Its activities are widespread. As its counsel in the Ohio post-judgment proceeding stated, it has built many warehouses in many States and has been party to "tens of thousands of contracts with many contractors." This is not a case of unequal bargaining power or overreaching. The Overmyer-Frick agreement, from the start, was not a contract of adhesion. There was no refusal on Frick's part to deal with Overmyer unless Overmyer agreed to a cognovit. The initial contract between the two corporations contained no confession-of-judgment clause. When, later, the first installment note from Overmyer came into being, it, too, contained no provision of that kind. It was only after Frick's work was completed and accepted by Overmyer, and when Overmyer again became delinquent in its payments on the matured claim and asked for further relief, that the second note containing the clause was executed.

Overmyer does not contend here that it or its counsel was not aware of the significance of the note and of the cognovit provision. Indeed, it could not do so in the light of the facts. Frick had suggested the provision in October 1966, but the first note, readjusting the progress payments, was executed without it. It appeared in the second note delivered by Overmyer's own counsel in return for substantial benefits and consideration to Overmyer. Particularly important, it would seem, was the

release of Frick's mechanic's liens, but there were, in addition, the monetary relief as to amount, time, and interest rate.

Overmyer may not have been able to predict with accuracy just how or when Frick would proceed under the confession clause if further default by Overmyer occurred, as it did, but this inability does not in itself militate against effective waiver. See *Brady* v. *United States*, 397 U. S., at 757; *McMann* v. *Richardson*, 397 U. S. 759, 772–773 (1970).

We therefore hold that Overmyer, in its execution and delivery to Frick of the second installment note containing the cognovit provision, voluntarily, intelligently, and knowingly waived the rights it otherwise possessed to prejudgment notice and hearing, and that it did so with full awareness of the legal consequences.

Insurance Co. v. *Morse*, 20 Wall. 445 (1874), affords no comfort to the petitioners. That case concerned the constitutional validity of a state statute that required a foreign insurance company, desiring to qualify in the State, to agree not to remove any suit against it to a federal court. The Court quite naturally struck down the statute, for it thwarted the authority vested by Congress in the federal courts and violated the Privileges and Immunities Clause.

Myers v. *Jenkins*, 63 Ohio St. 101, 120, 57 N. E. 1089, 1093 (1900), involving an insurance contract that called for adjustment of claims through the company alone and without resort to the courts, is similarly unhelpful.

IV

Some concluding comments are in order:

1. Our holding necessarily means that a cognovit clause is not, *per se*, violative of Fourteenth Amendment due process. Overmyer could prevail here only if the clause were constitutionally invalid. The facts of this case, as

we observed above, are important, and those facts amply demonstrate that a cognovit provision may well serve a proper and useful purpose in the commercial world and at the same time not be vulnerable to constitutional attack.

2. Our holding, of course, is not controlling precedent for other facts of other cases. For example, where the contract is one of adhesion, where there is great disparity in bargaining power, and where the debtor receives nothing for the cognovit provision, other legal consequences may ensue.

3. Overmyer, merely because of its execution of the cognovit note, is not rendered defenseless. It concedes that in Ohio the judgment court may vacate its judgment upon a showing of a valid defense and, indeed, Overmyer had a post-judgment hearing in the Ohio court. If there were defenses such as prior payment or mistaken identity, those defenses could be asserted. And there is nothing we see that prevented Overmyer from pursuing its breach-of-contract claim against Frick in a proper forum. Here again that is precisely what Overmyer has attempted to do, thus far unsuccessfully, in the Southern District of New York.

The judgment is

Affirmed.

MR. JUSTICE POWELL and MR. JUSTICE REHNQUIST took no part in the consideration or decision of this case.

MR. JUSTICE DOUGLAS, whom MR. JUSTICE MARSHALL joins, concurring.

I agree that the heavy burden against the waiver of constitutional rights, which applies even in civil matters, *Ohio Bell Tel. Co.* v. *Public Utilities Comm'n*, 301 U. S. 292, 307 (1937); *Aetna Ins. Co.* v. *Kennedy*, 301 U. S.

389, 393 (1937), has been effectively rebutted by the evidence presented in this record. Whatever procedural hardship the Ohio confession of judgment scheme worked upon the petitioners was voluntarily and understandingly self-inflicted through the arm's-length bargaining of these corporate parties.

I add a word concerning the contention that opening of confessed judgments in Ohio is merely discretionary and requires a higher burden of persuasion than is ordinarily imposed upon defendants. As I read the Ohio law of cognovit notes, trial judges have traditionally enjoyed wide discretion in vacating confessed judgments. 32 Ohio Jur. 2d, Judgments § 558 (1958). In *Livingstone* v. *Rebman,* 169 Ohio St. 109, 158 N. E. 2d 366 (1959), however, the Ohio Supreme Court imposed certain safeguards on the exercise of a judge's discretion in opening confessed judgments. That case also involved a petition to open a confessed judgment where, as here, the debtor alleged the affirmative defense of failure of consideration. Using the preponderance-of-the-evidence test, the trial court had found insufficient support for the debtor's claim and had dismissed the motion to open. On appeal, however, the Ohio Supreme Court reversed on the degree of proof needed to vacate a confessed judgment. Said the court:

> "[I]f there is credible evidence supporting the defense . . . from which reasonable minds may reach different conclusions, it is then the *duty* of the court to suspend the judgment and permit the issue raised by the pleadings to be tried by a jury or, if a jury is waived, by the court." *Id.,* at 121–122, 158 N. E. 2d, at 375. (Emphasis supplied.)

Thus it would appear that the Ohio confessed judgment may be opened if the debtor poses a jury question, that

is, if his evidence would have been sufficient to prevent a directed verdict against him. That standard is a minimal obstacle.*

The fact that a trial judge is *dutybound* to vacate judgments obtained through cognovit clauses where debtors present jury questions is a complete answer to the contention that unbridled discretion governs the disposition of petitions to vacate. See also *Goodyear* v. *Stone*, 169 Ohio St. 124, 158 N. E. 2d 376 (1959); *McMillen* v. *Willard Garage Inc.*, 14 Ohio App. 2d 112, 115, 237 N. E. 2d 155, 158 (1968); *Central National Bank of Cleveland* v. *Standard Loan & Finance*, 5 Ohio App. 2d 101, 104, 195 N. E. 2d 597, 600 (1964).

The record shows that the petitioners were given every opportunity after judgment to explain their affirmative defense to the state courts and that the defense was rejected solely because the evidence adduced in support thereof was too thin to warrant further presentation to a jury.

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*Thus the Ohio system places no undue burden of proof upon the debtor desiring to open a confessed judgment, in marked contrast to the Pennsylvania procedure involved in *Swarb* v. *Lennox*, *post*, p. 191. In Pennsylvania in order to vacate such a judgment, a borrower must prove his defense by the preponderance of the evidence rather than by merely mustering enough evidence to present a jury question. Once the judgment is vacated, moreover, he must again prevail by that standard at a subsequent trial. In effect, the Pennsylvania confessed debtor is required to win two consecutive trials, not simply one. Given the proclivities of reasonable men to differ over the probative value of jury questions, the Pennsylvania requirement of twice sustaining the preponderance of the evidence imposes a stiffer burden of persuasion.